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SUPREME COURT, U. S.

In The

Supreme Court of the United States

October Term, 1973

No. 73-.....

CARL STUART STANLEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Carl Stuart Stanley, petitioner, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in this case on January 28, 1974.

OPINION BELOW

The United States Court of Appeals for the Fourth Circuit rendered a Per Curiam opinion[1] on January 28, 1974 (No. 73-1312), a copy of which is found in the Appendix at App. 1.

[1] The Court of Appeals rendered another opinion in No. 73-1312 on November 28, 1973, with reference to co-defendants, but the Court elected to treat separately the appeal of Carl Stuart Stanley.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was made and entered on January 28, 1974 (No. 73-1312), and a copy thereof is appended to this petition in the Appendix at App. 2. The jurisdiction of this Court is envoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED FOR REVIEW

Whether the prosecuting attorney's improper inquiry and comment, before the jury, depicting the petitioner's silence and his assertion of his Fifth Amendment privilege against self-incrimination requires reversal?

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved is the Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S. CONST. AMEND. V.

STATEMENT

After a jury trial on October 24 and October 25, 1972, in the United States District Court for the Eastern District of Virginia, the petitioner and four other defendants were convicted of conspiring to violate the Interstate Trans-

portation of Stolen Motor Vehicles statute, 18 U.S.C. §§ 2 and 2312. The petitioner was found guilty pursuant to the Conspiracy statute, 18 U.S.C. § 371. Stanley was acquitted on five other counts in the indictment.

The indictment charged that Stanley's function in the conspiracy consisted of the fraudulent duplication of automobile ignition keys belonging to stolen cars, so that the latter could be driven from Richmond to Pennsylvania.

The Government's case against the petitioner focused on the testimony of a co-conspirator, Willard Thomas Burkett, III. The latter testified in District Court that on grand jury day in May of 1972, he and Stanley had lunch together and their conversation centered around the stolen automobiles. Burkett further testified that during this conversation, Stanley told him that he (Stanley) was attending the grand jury hearing because "he supplied the keys." (App. 5).

Stanley took the stand in his defense and under cross-examination by the prosecuting attorney admitted having lunch with Burkett but denied ever having made the above statement. The prosecuting attorney then asked the petitioner if he had discussed the case "with us at any great length" (App. 5). In response the petitioner indicated that such discussions were cut off when he learned that he was under suspicion and requested to have a lawyer present. The prosecuting attorney then responded: "You never made any statement to . . ." (App. 6). At this point, counsel objected to the prosecuting attorney's line of questioning designed to suggest that Stanley remained silent and invoked his Fifth Amendment privilege. The objection was overruled.

Subsequently the petitioner appealed to the United States Court of Appeals for the Fourth Circuit seeking reversal

and a new trial. The Court, in a Per Curiam decision, found no reversible error.

REASONS FOR GRANTING THE WRIT

It is abundantly clear that Stanley invoked his Fifth Amendment right against self-incrimination during discussions with the prosecuting attorney's office prior to the trial. After the prosecuting attorney asked: "Did you sit down and discuss this case with us at any great length," (App. 5), the petitioner was not allowed to finish his negative response. It is obvious that the response would have been that he refused to talk. The prosecuting attorney's queries as to whether or not the petitioner was advised of his rights (App. 6), and the Judge's explanation for overruling counsel's objection (App. 6) further drive home the point that Stanley invoked his Fifth Amendment privilege.

All of the above testimony and evidence was heard in the presence of the jury. They could only conclude that Stanley asserted his Fifth Amendment privilege against self-incrimination and that his silence must mean that he was guilty.

The decision of the Court below is in conflict with a number of cases. The line of questioning developed by the prosecuting attorney has long been held to be reversible error. The leading case on this point is *Grunewald* v. *United States*, 353 U.S. 391, 77 Sup.Ct. 963, 1 L.Ed.2d 1344 (1957). As in the case at bar, the defendant in *Grunewald* was indicted for conspiracy and took the stand in his own defense. The Government was allowed to cross-examine the defendant concerning his assertion of his Fifth Amendment right before a grand jury. The Court stated:

> But where such evidentiary matter has grave constitutional overtones, as it does here, we feel justified in

> exercising this Court's supervisory control to pass on such a question. This is particularly so because in this case the dangers of impermissible use of this evidence far outweighed whatever advantage the Government might have derived from it if properly used. If the jury here followed the judge's instructions, namely, that the plea of the Fifth Amendment was relevant only to credibility, then the weight to be given this evidence was less than negligible, since, as we have outlined above, there was no true inconsistency involved; it could therefore hardly have affected the Government's case seriously to exclude the matter completely. On the other hand, the danger that the jury made impermissible use of the testimony by implicitly equating the plea of the Fifth Amendment with guilt is, in light of contemporary history, far from negligible. Weighing these factors, therefore, we feel that we should draw upon our supervisory power over the administration of federal criminal justice in order to rule on this matter. 353 U.S. at 423.

Furthermore, in his concurring opinion, Mr. Justice Black, at page 425, stated that he could:

> think of no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it. This value of constitutional privileges is largely destroyed if persons can be penalized for relying on them.

Similarly, in the present case, the prosecuting attorney deliberately questioned Stanley about his prior discussion with the United States Attorney's Office. His only objective was to instill in the jurors' minds the idea that Stanley's silence, his assertion of the Fifth Amendment privilege, was tantamount to an admission of guilt. One can see that the formula, so feared by the Court in *Grunewald*, that equates the assertion of the Fifth Amendment right with guilt, can be found in the case at bar.

In *Miranda* v. *Arizona*, 384 U.S. 436, 86 Sup. Ct. 1602, 16 L.Ed.2d 694 (1966), the Court considered as a matter of constitutional law whether the prosecutor may use an accused's exercise of his privilege against him at trial. The Court stated:

> In accord with our decision today, it is impermissible to penalize an individual for exercising the Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation. 384 U.S. at 468, Note 37.

In *Fagundes* v. *United States*, 340 F.2d 673 (1st Cir. 1965), a defendant was cross-examined on his failure to make a statement. The First Circuit stated:

> When one takes the stand in his own defense he of course puts his credibility as a witness in issue. Nevertheless we think it reversible error to permit evidence of refusal to talk and of request for counsel on arrest to be used for the purpose of impeachment. 340 F.2d at 677.

Also, in *Fowle* v. *United States*, 410 F.2d 48 (9th Cir. 1969), a prosecuting attorney elicited on cross-examination the fact that the defendant had not made a statement to arresting agents. The Ninth Circuit reversed the conviction.

In *United States* v. *Matos*, 444 F.2d 1071 (7th Cir. 1971), a postal inspector testified that the defendant, having been advised of his rights, "indicated that he did not desire to make a statement." The Trial Judge denied a motion for mistrial and denied a motion to instruct the jury to disregard the postal inspector's statements. The Seventh Circuit held that the defendant's Fifth Amendment right was violated by the postal inspector's evidence and the error was compounded by the Trial Court's refusal to instruct

the jury. Similarly, the Trial Judge in the case at bar overruled the defense counsel's objection to the prosecuting attorney's line of questioning. Thus, the Trial Court gave tacit approval to this line of questioning; and, of course, as a result of the ruling, there was no cautionary instruction.

From the prosecuting attorney's line of questioning, the jury could only conclude that Stanley refused to discuss the case, thus invoking his Fifth Amendment privilege. The Trial Judge's refusal to sustain the defendant's objection to this questioning permitted the jury to conclude that Stanley had something to hide and that his silence was an admission of guilt. Yet, the essence of the privilege against self-incrimination is that the accused is permitted to stand mute, clothed in the presumption of innocence. To permit the exercise of that privilege to be used adversely against the accused would reduce it to a nullity.

CONCLUSION

It is respectfully submitted that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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Counsel for Petitioner

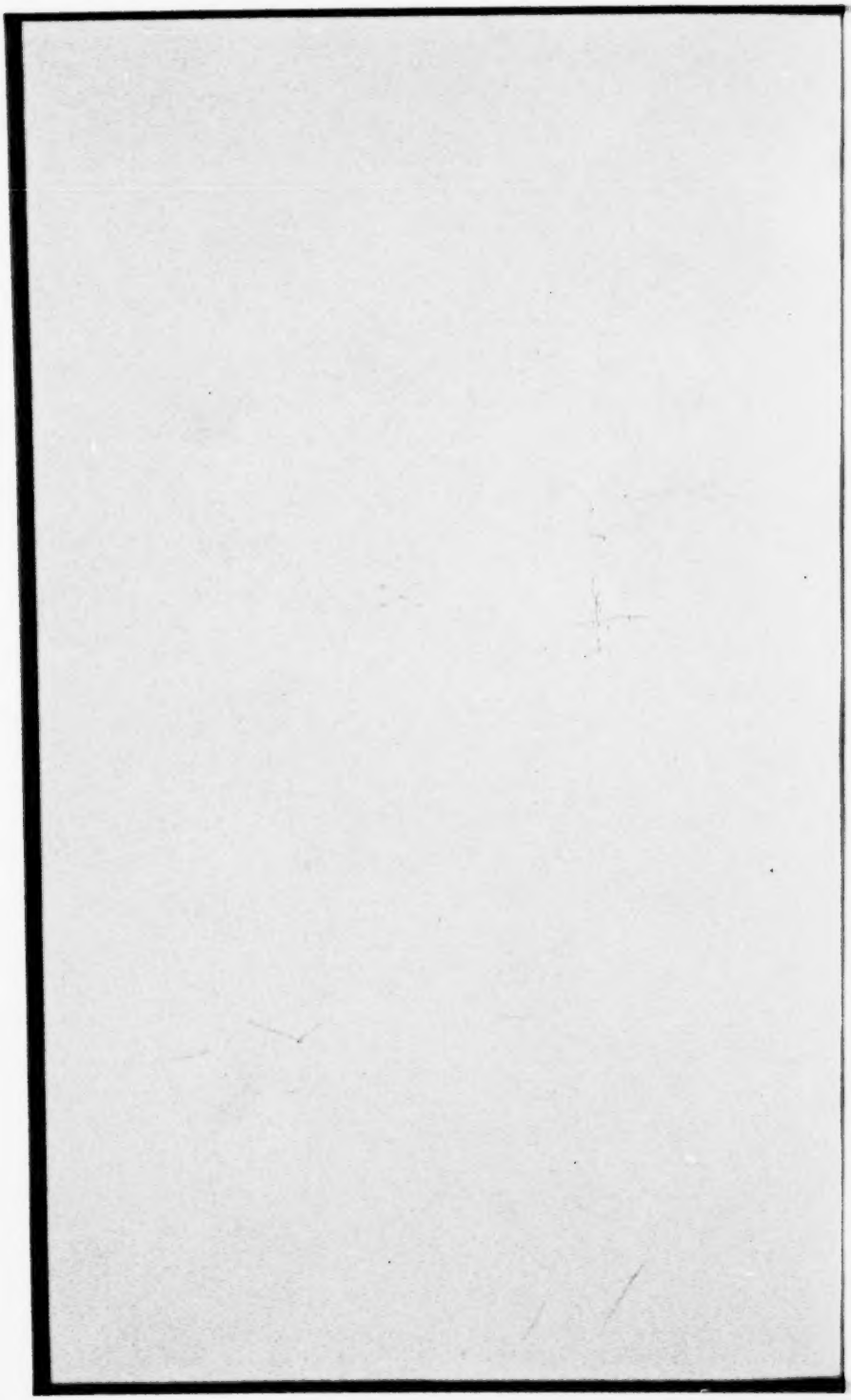
CERTIFICATE

I, L. Paul Byrne, one of the attorneys for Carl Stuart Stanley, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 27th day of February, 1974, I served copies of the foregoing Petition for Certiorari to the Supreme Court of the United States on the several parties as follows:

1. On the United States, by delivering a copy thereof at the office of Rodney Sager, Esq., Assistant United States Attorney for the Eastern District of Virginia, United States Courthouse Building, Richmond, Virginia, and by delivering a copy thereof at the office of the Solicitor General, Department of Justice, Washington, D. C.

L. PAUL BYRNE
Of Counsel for Petitioner

APPENDIX



PER CURIAM OPINION

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-1312

United States of America,

Appellee,

versus

Carl Stuart Stanley, Frederick Thomas Dailey, and Charles Gilbert Wilkerson,

Appellants.

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ppeal from the United States District Court for the astern District of Virginia, at Richmond. Robert R. Merhige, Jr., District Judge.

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rgued January 9, 1974. Decided January 28, 1974

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efore Haynsworth, Chief Judge, and Winter and Widener, Circuit Judges.

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ndrew W. Wood (Wood and Street on brief) for Appellant Stanley; (Leonard A. Paris; White, Cabell, Paris and Lowenstein on brief for Appellants Dailey and Wilkerson); Rodney Sager, Assistant United States Attorney, (Brian P. Gettings, United States Attorney, on brief) for Appellee.

ER CURIAM:

Upon consideration of the briefs and oral argument, we d no reversible error.

Affirmed.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-1312

United States of America,

Appellee,

vs.

Carl Stuart Stanley,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

Filed January 28, 1974

William K. Slate, II
Clerk

/s/ William K. Slate, II
Clerk

JUDGMENT

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

No. CR 122-72-R

United States of America

v.

Carl Stuart Stanley

On this 11th day of December, 1972 came the attorney for the government and the defendant appeared in person and by counsel.

It is Adjudged that the defendant upon his plea of Not Guilty and a verdict of Guilty has been convicted of the offense of Conspiracy, in violation of 18 U.S.C., Section 371 as charged in Count 6 of the indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) Years, in an institution of a type and place to be designated by the Attorney General or his duly authorized representative, or until sooner released in a manner provided by law, on Count 6.

It Is Adjudged that the defendant shall become eligible for parole at such time as the Parole Board may determine, pursuant to 18 USC, Section 4208(a)(2).

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Robert R. Merhige, Jr.
United States District Judge.

W. Farley Powers, Jr.
Clerk

* * *

EXCERPTS FROM THE TESTIMONY OF WILLARD THOMAS BURKETT, III, CALLED AS A WITNESS BY THE UNITED STATES

Direct Examination By Mr. Sager,
Assistant United States Attorney

Q. Now, in May of this year did you have occasion to be summonsed to a grand jury here? A. Yes.

Q. All right. Did you see Mr. Stanley present in the building? A. Yes.

Q. Did you go to lunch with him?- A. Yes.

Q. Did you have a conversation with him about these stolen automobiles? A. We were talking about what we were doing down there.

Q. What did he say to you, if anything? A. He told me the reason he was down here. He supplied the keys.

EXCERPTS FROM THE TESTIMONY OF CARL STUART STANLEY, THE DEFENDANT

Cross Examination By Mr. Sager,
Assistant United States Attorney

Q. Did you ever tell anybody in the government you didn't know anything about this case? A. I told all the government people come see me, I knew nothing about this case.

Q. Now, Mr. Stanley, let me go over this again. Did you sit down and discuss this case with us at any great length? A. No, sir, not after you—

Q. All right. A. Not after you told me I was a suspect. I told you I would prefer to have a lawyer present.

Q. That is correct, and you were advised of your rights.
A. Yes, sir.

Q. You never made any statement to—

Mr. Paris: Objection. If your Honor please, that is absolutely improper.

The Court: What is improper?

Mr. Paris: Absolutely improper. I don't think it is proper to argue this legal point in front of the jury.

The Court: Then objection is overruled.

Mr. Paris: You never heard my objection, Judge.

The Court: You don't want to make it. If you have an objection make it.

Mr. Paris: My objection is that it is improper for the Government to advise a man of his rights that he doesn't have to say anything and then tell the jury he didn't say anything. By innuendo—

The Court: Objection is overruled. It is not only proper for the Government to tell him what his rights are, it is illegal for them to talk to him without so doing.

Next question.

* * *

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No. 73-1318

In the Supreme Court of the United States

OCTOBER TERM, 1973

CARL STUART STANLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1318

CARL STUART STANLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that a question asked by the prosecutor in the presence of the jury violated his Fifth Amendment right not to incriminate himself.

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted on one count of a six-count indictment of conspiring to violate 18 U.S.C. 2312 (interstate transportation of stolen motor vehicles), in violation of 18 U.S.C. 371. Petitioner was sentenced to five years' imprisonment, subject to the parole eligibility provisions of 18 U.S.C. 4208(a)(2) (Pet. App. 3). The court of appeals affirmed the conviction *per curiam* (Pet. App. 1).

While petitioner was being cross-examined, the following colloquy took place (Tr. 402):

Q. Now, Mr. Stanley, let me go over this again. Did you sit down and discuss this case with us at any great length?

A. No sir, not after you—

Q. All right.

A. Not after you told me I was a suspect. I told you I would prefer to have a lawyer present.

Q. That is correct, and you were advised of your rights?

A. Yes, sir.

Q. You never made any statement to—

[Defense Counsel]: Objection. If Your Honor please, that is absolutely improper.

The judge overruled petitioner's objection and stated that it was incumbent on the government to advise petitioner of his constitutional rights prior to questioning him.[1] Government counsel immediately turned his attention to other matters and did not pursue the line of questioning to which petitioner's counsel had objected. No further reference was made to the above colloquy or to petitioner's refusal to provide information to the prosecuting attorney prior to trial.

In the circumstances, the above-stated exchange was not a comment on the privilege. Indeed, petitioner himself referred to his request to have a lawyer present, after government counsel apparently attempted to foreclose any further comment in response to the original question. Thus, petitioner himself encouraged the exchange

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[1]The defense never requested a curative instruction on this point, nor did it object to the judge's failure to give such an instruction during his charge to the jury.

to which he now objects. This is not a case where the government has requested the jury to draw any inference of guilt from petitioner's assertion of his privilege against self-incrimination. Cf. *Griffin* v. *California*, 380 U.S. 609. Petitioner's silence in the prosecutor's office was not used to impeach his trial testimony. Cf. *Harris* v. *New York*, 401 U.S. 222; *Fowle* v. *United States*, 410 F. 2d 48 (C.A. 9). Nor was there any meaningful examination relating to petitioner's assertion of his Fifth Amendment rights for the purpose of creating an impermissible inference for the jury. Cf. *Grunewald* v. *United States*, 353 U.S. 391; *Fagundes* v. *United States*, 340 F. 2d 673 (C.A. 1). The prosecutor made no attempt to comment on the petitioner's failure to make statements prior to trial. Cf. *United States* v. *Anderson*, 481 F. 2d 685 (C.A. 4); *Fowle* v. *United States*, *supra*, 410 F. 2d at 49. Accordingly, there has been no showing of either improper cross-examination by the prosecutor or of any possible prejudice to petitioner.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1974.

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[2]The instant case is thus distinguishable from *United States* v. *Matos*, 444 F. 2d 1071 (C.A. 7), upon which petitioner relies, in which the defendant's failure to make a statement explaining his conduct when he was apprehended bore "directly on a precisely vital question of [his] intention" (*id.* at 1074).